IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 717.

LOUISVILLE JOINT STOCK LAND BANK, - *Petitioner,*

v.

WILLIAM W. RADFORD, SENIOR, - - *Respondent.*

RECOMMENDATION

—BY—

EDWIN A. KRAUTHOFF.

Now this day comes Edwin A. Krauthoff in pro. per., and files this document by way of recommendation herein.

(In explanation of the form which this document has assumed, the following is submitted: Originally Mr. Krauthoff and the debtor, Mr. Radford, entered into an arrangement whereby Mr. Krauthoff was authorized to act as counsel herein for Mr. Radford, with plenary powers. So far as Mr. Krauthoff is advised, that arrangement has not been terminated. In order, however, to simplify the situation, and to prevent any controversy that might arise in the event that an effort be made to revoke such authority, Mr. Krauthoff submits this document in pro. per., in the form of a recommendation.)

I.

The first recommendation is that the Court accept as controlling authority herein, the decision of this Court (April 1, 1935), Continental Illinois Nat. Bk. & Tr. Co. v. Chicago, Rock Island & Pacific Ry. Co., and accordingly uphold as constitutionally valid, the Frazier-Lemke Act so far as the type and character thereof and its underlying principle are concerned. See, also, 75 Fed. (2d) 894, 897, 947.

II.

As to the application of the Fifth Amendment to this proceeding:

The Fifth Amendment does not provide that an Act of Congress, which in circumstances not yet arisen as to a person who may or may not be a party to the proceeding at issue, may deprive him of his property without due process of law, is for that reason invalid as to everybody and in all circumstances. The Fifth Amendment deals with particulars and not generalities, with the logic of events, and not the doctrine of imaginary possibilities.

> "A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied."
>
> Nashville, etc., Ry. Co. v. Walters (March 4, 1935), 55 Sup. Ct. 486, 488.

Consult I Kings 8:59.

Tested by this standard, the only question arising on the record herein is the propriety of the action of the District Court in granting to Mr. Radford a tenancy for a definite period, of the farm once owned by him upon the terms fixed by the District Court, for that is the only action taken by the District Court in this case.

Upon further study and reflection, the author of this document has been impelled to conclude, that under the precise language of the Frazier-Lemke Act as passed, the action of the District Court in permitting Radford without the consent of Louisville Joint Stock Land Bank to become a tenant of the farm once owned by him, is not warranted by the terms of the statute as written, but is sustainable on other grounds.

Turning to the Frazier-Lemke Act, we find that the statutory right of Mr. Radford to repurchase the farm once owned by him must be predicated of an agreement on his part to do so.

In the opening sentences of the Frazier-Lemke Act (Subdivision (s), Section 75, National Bankruptcy Act, approved June 28, 1934), a provision is found:

> "Such farmer" (that is a farmer who has failed to obtain the acceptance of a majority in number and amount of all his creditors whose claims are affected by a composition or extension proposal and who thereafter has been adjudicated a bankrupt), "may petition the court that all of his property * * * be appraised * * * and that he be allowed to retain possession * * *

of his property and pay for same under the terms and conditions set forth in this subsection (s)."

Paragraph (1) of Subsection (s), Frazier-Lemke Act, then provides for the appointment of appraisers and the making of an appraisal.

Paragraph (2) of the Act just cited, provides for the entry of an order of a possessory nature on the part of the debtor. But inasmuch as this possession is "subject to and inferior to all liens," which "shall remain in full force and effect," it is evident that paragraph (2), just cited, gives no right of repurchase to the debtor, but merely a limited right to a possession of his estate.

To understand paragraph (3) of the Frazier-Lemke Act as enacted, we must read the paragraph in the form it assumed as Mr. Lemke introduced the bill. As thus drafted, the paragraph began in this wise; "Upon request of the debtor, the trustee * * * shall agree to sell to the debtor," all or part "of the bankrupt estate at the appraised value," not inserting the words thereafter added by amendment, "and with the consent of the lienholder or lienholders."

As thus written, it is clear:

(a) Originally, paragraph (3) of the Frazier-Lemke Act was self-executing and did not depend upon the consent of the lienholder for its operative force and effect.

(b) Paragraph (3) of the Act as introduced and passed, contemplates an agreement by the trustee to

sell, consequently of the debtor to buy, and contains no element of an option to the debtor to purchase.

See authorities, *infra.*

Paragraph (4) of the Act then states: "An agreement having been reached as provided in Subsection (3);" so that paragraph (4) recognizes:

(a) The agreement to sell by the trustee and to buy by the debtor, depends on paragraph (3) of the Act;

(b) The "manner of payments and distribution of debtor's property" under the Act depends in the alternative specified in paragraph (7) thereof (that is, a written objection by a secured creditor), either upon paragraph (3) or paragraph (7).

As thus written, the Act was intelligible and if so enacted would have been operative.

But in the stress and strain of the closing days of Congress, the words "with the consent of the lienholder or lienholders" were inserted in the opening part of paragraph (3) of the Act, in the House of Representatives after it had passed the Senate by an amendment not offered by Mr. Lemke, and were then agreed to in conference.

Judge Lindley, *In Re* Miner, 9 Fed. Supp. 1, discusses the effect of the language of Congress in thus amending the bill, and in the judgment of the author of this document (reached after many efforts to demonstrate a contrary result), this Court is compelled to adopt the reasoning of Judge Lindley in that particular.

The effect of Judge Lindley's ruling may be thus summarized:

(a) Paragraph (3) of the Act depends for its operative force and effect upon the consent of the lienholder.

(b) The operative force and effect of paragraph (7) of the Act, is hypothesized of a written objection by the lienholder to the manner of payments and distribution of the debtor's estate provided in paragraph (3) of the Act.

(c) In the absence of a consent under paragraph (3) of the Act and of a written objection under paragraph (7) of the Act, neither paragraph operates and no relief is accorded to the debtor thereunder.

In this connection, it must be remembered that upon the adjudication of Mr. Radford, as a bankrupt, the title to his farm passed from him to the trustee in bankruptcy of the estate.

National Bankruptcy Law, Sec. 70.

Under Section 70(a), National Bankruptcy Law, the trustee is vested with the title of the bankrupt as to all non-exempt property owned by him.

Gilbert's Collier on Bankruptcy (3d Ed.), p. 1166, Sec. 1448.

And before the title of the trustee revests in the debtor there must be a statute containing operative words of conveyance.

In order to convey by grant, the grantor must use apt and proper words to convey to the grantee.

Agricultural Bank v. Rice, 4 How. 225.
16 Century Digest, Col. 57, Sec. 55.

So that by the adjudication, the title to his farm having passed from the debtor to the trustee in bankruptcy of his estate, the debtor, in order to succeed under the Frazier-Lemke Act in regaining the title to the farm once owned by him, without the cooperation of the lienholder thereon, must point out, a provision of that Act in some manner entitling him to that right without such consent.

At one time it was thought that if the Court adopted the Miner case as the law of this case, the Radford case would have become moot. But counsel are now of opinion that the fundamental question, is the Frazier-Lemke Act valid in principle and as to type, the Fifth Amendment still remains to be considered.

As already pointed out, the necessary operative words of conveyance to revest in the debtor the title which had passed to the trustee, are found in paragraph (3) of the Act and that paragraph does not operate without the consent of the lienholder. As the operative force and effect of paragraph (7) depends entirely upon paragraph (3), for no operative words of conveyance are found in paragraph (7), it is quite immaterial, so far as paragraph (7) is concerned whether or not an objection is filed as therein hypothesized.

So the Court must take the Miner case into account. As counsel is compelled, its correctness, then as the lienholder in the proceedings at bar did not consent to the operation of paragraph (3), the fact that it objected to the operation of paragraph (7) is immaterial.

If the Court adopts the reasoning of Judge Lindley, that the right of a farmer to repurchase his farm does not exist under the Frazier-Lemke Act unless the lienholder consents thereto (and the author of this document is reluctantly driven to the conclusion that such result is inescapable), no question under the Fifth Amendment arises in this proceeding.

For as written, under paragraph (3) of the Act, a trustee may not agree to sell all or part of an estate to the debtor without the consent of the lienholder.

Therefore, paragraph (3) of the Act, does not operate without the consent of the lienholder. A lienholder cannot complain of that to which he consents (*Volenti non fit injuria*). Hence it cannot be argued that paragraph (3) of the Act deprives a lienholder of his property without due process of law, for nothing may result from paragraph (3) of the Act, unless he does consent thereto.

As to *"Volenti Non Fit Injuria:"*

67 Corpus Juris, p. 270, note 4.
Broom's Legal Maxims (9 Ed.), p. 188.

> "A person may by his acts • • • waive a right which he might otherwise have under the Constitution of the United States."

I Cooley's Const. Lim. (8th Ed.), p. 368.
Pierce v. Somerset Railway, 171 U. S. 641, 648.

Shepard v. Barron, 194 U. S. 553, 567.
Pierce Oil Corporation v. Phoenix Refining Co., 259 U. S. 125.
Greene County v. Lydy, 263 Mo. 77, 87.

A corporation may not complain on constitutional grounds of a legislative provision to which it consented by becoming incorporated thereunder. International, etc., Ry. Co. v. Anderson County, 246 U. S. 424, 433.

As to the requirements, under paragraph (3) of the Act, that a trustee enter into an agreement to sell, hence the debtor enter into an agreement to purchase, before the right of the debtor arises to regain his title to the farm once owned by him, note:

An agreement means "a mutual assent (of two or more minds) to do a thing." An agreement indicates "a concurrence of minds."

> "A contract is an agreement between two or more parties for the doing or not doing of some specified thing."

The word agreement connotes a mutual obligation. 1 Words & Phrases (3rd Series), p. 374:

> "To constitute an agreement, there must be a proposal by one party and an acceptance by another, which must be manifested by some appropriate act.
>
> "An agreement contemplates a meeting of minds. One party may have intended to sell, the other party may have intended to buy, yet this would not be sufficient, unless the intention of each was in some way communicated from one to the

other, and was understood and agreed to by both.

"There is no difference between a 'contract' and an 'agreement.'"

1 Words & Phrases (2d Series), p. 171:

"Agreement necessarily embraces two parties in a contract of sale one to sell and one to buy" (17 Barb. 6, 260, 263).

In White v. Treat, 100 Fed. 290, 291, the words "agreement" and "contract" are deemed synonymous:

"* * * it is apparent that to a sale a buyer is as essential as a seller. No amount of offering to sell will make a contract of sale, until someone accepts the offer by agreeing to buy" (100 Fed. 291, Lacombe, Circuit Judge).

"Contract is the form of obligation which arises out of the agreement of the parties."

1 Page on Contracts, Sec. 41.

An agreement of a sale is a contract binding both parties to buy and sell.

Loud v. St. Louis Union Trust Co., 318 Mo. 592.

The distinction between an agreement to sell and an agreement to purchase is discussed: Keogh v. Peck, 316 Ill. 318, 38 A. L. R. 1151. Davis v. Roseberry, 95 Kan. 411, 3 A. L. R. 564 (note).

An option is not "an agreement to sell" (3 A. L. R. 566); conversely, an agreement to sell is not an option to purchase.

From the foregoing, we are impelled to conclude

that paragraphs (3) and (4) of the Frazier-Lemke Act contemplate an agreement on the part of the trustee to sell.

(Hence, an agreement on the part of the debtor to purchase), instead of an agreement on the part of the trustee to give the debtor an option to purchase.

Inasmuch therefore, as the tenancy of the debtor under paragraph (7) is predicated of an agreement of the debtor to purchase under paragraph (3), as paragraph (7) relates only to the "manner of payments and distribution," and as paragraph (3) is operative only with the consent of the lienholder, the tenancy of a debtor under the language of the Act, as written, depends entirely upon the consent of the lienholder; hence no question arises in this proceeding under the Fifth Amendment.

As applied to the facts of this proceeding, the inevitable result is that the debtor Radford is not entitled to retain his farm as a tenant under the provisions of the Act, as written. His right to relief herein therefore is dependent upon other considerations.

III.

The District Court in the proceeding herein pending, as a result of the filing of the petition by Mr. Radford for relief under Section 75, National Bankruptcy Act, is possessed of jurisdiction of the farm of the debtor without limitation as to the time in which previous proceedings may have been instituted in state courts.

The power of Congress under the bankruptcy clause of the Federal Constitution is supreme and displaces the effect of state action as to any subject within the jurisdiction of Congress and upon which it may have acted.

In re Watts v. Sachs, 190 U. S. 1.
Stellwagen v. Clum, 245 U. S. 605.
International Shoe Co. v. Pinkus, 278 U. S. 261.

The petition for debtor's relief by Radford, under the terms and provisions of Section 75, National Bankruptcy Law, as approved March 3, 1933, is governed *inter alia* by these provisions of that section:

"(n) The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed.

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court

or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court: * * *

"(2) Proceedings for foreclosure of a mortgage on land, * * *

"(p) The prohibitions of subdivision (o) shall not apply to proceedings for the collection of taxes, or interest or penalties with respect thereto, nor to proceedings affecting solely property other than that used in farming operations or comprising the home or household effects of the farmer or his family."

None of the subdivisions just quoted are found in the Frazier-Lemke Act. All are found in the Act of March 3, 1933, which Act, under the doctrine recognized in the Rock Island cases, decided by this Court, April 1, 1935, is clearly constitutional.

So, that, under the Act of March 3, 1933, followed by the adjudication in bankruptcy of Radford (clearly valid, 186 U. S. 186), the estate of Radford came within the plenary jurisdiction of the District Court as a Court of Bankruptcy. This jurisdiction is unlimited as to time or place. Note the language: (n) "property, wherever located." Note also, the four months period, an element of Section 67 (c), (e), National Bankruptcy Act, is not a part of Section 75, as approved March 3, 1933, nor of the Frazier-Lemke Act, approved June 28, 1934.

National Bankruptcy Law, as approved July 1, 1898, and Section 75 thereof, as approved March 3, 1933, were not written from the same standpoint and do not evidence the same intent or spirit, hence differ in their interpretation. The Act of 1898 was written to promote the interests of commerce and from the standpoint of the creditor. In business it is important a merchant know, within reasonable limits, the extent of obligations from day to day. For this reason, for example, his liability as an endorser must be fixed by protest on the day of the maturity of the paper he endorsed. So, by parity of reasoning, if such merchant be a preferred creditor, he should know within a reasonable time if such preference is to be challenged. So the four months period of limitation as to preferential transactions is written into the National Bankruptcy Law as approved July 1, 1898.

Indeed, it may be admitted, that if a valid (that is free from fraud) non-preferential transaction occur within four months, resulting in a creditor being secured in circumstances leaving no surplus for distribution among general creditors, the Bankruptcy Court would not concern itself with such assets; for the Act of 1898 is for the primary protection of general unsecured creditors and deals only incidentally with secured creditors.

A debtor filing a petition under the general Bankruptcy Law is not interested in the four months rule as to secured creditors. He is allowed a discharge from his debts without limitation as to time. The sub-

ject of a discharge is all that affects him under the Act of 1898. He is not concerned in the question of validity of securities from a preferential standpoint. His indebtedness is not altered by setting aside preferential transaction, for in that event, while prior unsecured creditors might receive dividends on their debts, the prior secured creditor would thereby find his indebtedness increased. The total indebtedness of the bankrupt is not affected by setting aside preferential transactions; only the manner of distribution of his assets.

But the Act of March 3, 1933 (Section 75), is written for the purpose of keeping an indebted farmer on a mortgaged farm, and if possible eventually, to restore such debtor to his possession (Lev. 25: 13). To such a one, the date of his mortgage is quite unimportant. The effect thereof only concerns him. To apply the four months rule to a farm mortgage in proceedings under Section 75, in effect, would nullify the law, for within four months prior to March 3, 1933, few farm mortgages were negotiated. In addition, a farm mortgage usually runs six months before a default may occur. So a farm mortgage executed within four months prior to a petition for debtor's relief filed under Section 75, as approved June 28, 1934, and which at the date of the petition might be in default, is practically non-existent.

Hence, the limitation of four months stressed in Straton v. New, 283 U. S. 318, is inapplicable to proceedings under Section 75.

In Cont. Ill. Nat. Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co. (April 1, 1935), 79 Sup. Ct. L. Ed. 642, the following rules of law on the subject of bankruptcies are announced:

(1) Courts of bankruptcy are invested "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings."

(2) Courts of bankruptcy are "essentially courts of equity, and their proceedings inherently proceedings in equity."

(3) The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is therefore inherent in a court of bankruptcy, as it is in a duly established court of equity."

(4) An injunction may issue from a Court of Bankruptcy suspending the enforcement of a lien upon collateral pending further action.

No question as to time was urged in the Rock Island cases. Indeed, the record will disclose the pledge in that proceeding was more than four months old.

Straton v. New, 283 U. S. 318, was approvingly cited in the Rock Island cases. In Straton v. New, the Court was dealing with a case arising under the general National Bankruptcy Act and where the lien, being enforced in a State Court, antedated the bankruptcy more than four months. It also ruled in Straton v. New: "And as the lien created by a judgment entered within four months is void, the court of bank-

ruptcy has jurisdiction to administer the property regardless of the lien and will restrain the prosecution of an action to enforce it."

But in Section 75, National Bankruptcy Law, approved March 3, 1933, the four months' provision found in the general law is omitted.

In re Jacobs, 7 Fed. Supp. 749.

As to the jurisdiction of a Court of bankruptcy of assets of the debtor subject to an outstanding lien, consult:

Lazarus v. Prentice, 324 U. S. 266.
Van Huffel v. Harkelroade, 284 U. S. 225.
Gross v. Irving Trust Co., 289 U. S. 342.
Taylor v. Sternberg, 79 L. Ed. 324.
5 Remington on Bankruptcy (3d Ed.), p. 447, Secs. 2365, *et seq.*

"The filing of the petition (in bankruptcy) is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition."

Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 307.

In re Looker, 6 Fed. Supp. 571, executions against a debtor obtaining benefit of Section 74, issued within four months of filing petition were enjoined.

In re Doelger, 6 Fed. Supp. 776, it was ruled that on the filing of a petition under Section 74, "from that

time forward, the debtor's property is *in custodia legis.*"

In re Burgh, 7 Fed. Supp. 184, it appeared that a trustee had been appointed for property in a State Court in 1932. The Court ruled, with respect to Section 74: "* * * it seems clear to the Court that it was the intention of Congress * * * to commit to the courts of bankruptcy exclusive jurisdiction over the debtor and his property wherever located, whether the property be subject to liens or otherwise;" hence the Court may appoint a custodian or receiver "of all of the debtor's property including that which is subject to liens."

In re Jacobs, 7 Fed. Supp. 749, a receiver was appointed in a State Court in 1932. On June 25, 1934, a debtor filed his petition under Section 74. Judge Lindley discussed the four months distinction theretofore prevailing. An extensive quotation was made from Isaac v. Hobbs Tie & Timber Co., 282 U. S. 734.

Judge Lindley ruled that the four months' limitation under the general bankruptcy law did not apply to proceedings under Section 74. "* * * the four months period as fixed by Congress was an arbitrary date and not one in any way limited by the Constitution," hence "when Congress saw fit to extend the time, it made all cases decided under the statutory four months provision applicable to the situation existing under the present amendment" (7 Fed. Supp. 754).

In re Bradford, 7 Fed. Supp. 665, Judge Chesnut held it within the power of the Federal Court to stay

a mortgage foreclosure instituted April 17, 1934, unless Subsection (s) was unconstitutional. See opinion in that case, 4 C. C. A., printed in full in Mr. Lemke's second brief in this case.

In re Miner, 9 Fed. Supp. 1, 11, Judge Lindley sustained the jurisdiction of the bankruptcy Court under Section 75 as against a pending foreclosure.

In re Klein, 9 Fed. Supp. 57, it was ruled that a bankruptcy Court had exclusive jurisdiction of an equity of redemption in effect at the date of the petition.

See also, *In re* Duffy, 9 Fed. Supp. 166, 169.
In re Kalina, 9 Fed. Supp. 170.
In re Rank, 9 Fed. Supp. 171.
In re Dickinson, 9 Fed. Supp. 419.
Jurisdiction was exercised, *In re* Hanley, 9 Fed. Supp. 463.
See also, *In re* O'Brien, 9 Fed. Supp. 892.
In re Granada Hotel Corporation, 9 Fed. Supp. 909.
In re Natural Dry Ginger Ale Corporation, 9 Fed. Supp. 1003.
In re Nelson, 9 Fed. Supp. 657.
Eaves v. Gleen, 9 Fed. Supp. 647.
In re Nineteenth & Walnut Streets Corporation, 9 Fed. Supp. 625.

In re Belber, 7 Fed. Supp. 762, a pledge was denied leave to sell a pledge on the ground: "Under so-called 'market conditions,' this stock has no value other than what the pledgee will let it go for." Affirmed, 72 Fed. (2d) 542.

See also:

In re McMurray, 8 Fed. Supp. 449.

Federal Land Bank v. Kurtz, 70 Fed. (2d) 46.
Re Lake County Fuel Supply Co., 70 Fed. (2d) 391.
Rubenstein v. Nourse, 70 Fed. (2d) 482.
Kimmel v. Crocker, 72 Fed. (2d) 599.
In re Faour, 72 Fed. (2d) 719.
Irving Trust Co. v. Fleming, 73 Fed. (2d) 423, 427.
In re Monsen, 74 Fed. (2d) 411.
In re Sterba, 74 Fed. (2d) 413.
In re Fox Metropolitan Play Houses, 74 Fed. (2d) 722.
In re Greylings Realty Corporation, 74 Fed. (2d) 734.
Hamilton Gas Co. v. Watters, 75 Fed. (2d) 176.
In re Kusel, 75 Fed. (2d) 314.
In re Martin, 75 Fed. (2d) 618.

Inasmuch as the District Court in the proceeding at bar herein had exclusive and plenary jurisdiction of the farm of Mr. Radford, it had jurisdiction to sell that farm clear of the lien thereon, and transfer the lien on the farm to the proceeds derived from the sale thereof.

Van Huffel v. Harkelroade, 284 U. S. 225.

But in selling the farm and transferring the lien on the farm to a lien on the proceeds, the bankruptcy Court is exercising jurisdiction of an equitable nature.

Consult, The Rock Island cases, decided by this Court, April 1, 1935.

1 Remington on Bankruptcy (4th Ed.), p. 51, Sec. 23.

The enforcement of a lien in a Federal Court is an exercise of the power of a Court of equity (184 Fed. 199, 202).

A Court, in exercising the jurisdiction of a Court of equity in foreclosing an equity of redemption, acts by grace and not by right, as a Court of conscience and not of dispossession, does not permit a lienholder to "behave itself unseemly," nor seek its own, but rather to bear all things, to endure all things (I Cor. 13).

Accordingly, we are reminded that several centuries ago, a form of mortgage prevailed in England whereby a mortgagor conveyed the title to the security in fee to the mortgagee, subject only to a defeasance in the event the debt was paid on the law day in the amount and manner specified in the mortgage. In the face of direct provisions in the mortgage to the contrary, the Chancellor discovered the equity of redemption which gave to a mortgagor who had not complied precisely with the conditions of the mortgage, the right to redeem therefrom and to regain that which had formerly belonged to him.

19 Ruling Case Law, p. 500, Secs. 296, *et seq.*, p. 516, Sec. 316.
Eaton on Equity, p. 445, Secs. 214, *et seq.*
Reeves, Illinois Law and Mortgages, p. 3, Sec. 2.

The circumstances in which a Court of equity discovered the equity of redemption and displaced the common law theory of mortgages, are discussed.

Clark v. Rayburn, 8 Wall. 318.
41 Corpus Juris, p. 275, Sec. 2.

Then as a development of the equity of redemption the Chancellor accorded to the mortgagee as an act of grace, and not of right, a foreclosure of the equity of redemption by fixing a time in which the privilege of redemption should be exercised, or in default thereof, the property be sold and the right of redemption "foreclosed" or cut off.

19 Ruling Case Law, p. 519, Sec. 319.

A striking example of the doctrine, the power of a Court of equity in foreclosing mortgages includes the power to inclose reasonable conditions upon the exercise of the power is the case of Fasdick v. Schall, *infra*.

A Court of equity has declared that in certain circumstances, unsecured claims are entitled to priority over mortgage debts.

10 Enc. U. S. Supp. Ct. (Michie Law Book Co.), pp. 571, *et seq.*

A mortgagee must "do equity in order to get equity."

Fasdick v. Schall, 99 U. S. 235, 253.
Union Trust Co. v. Souther, 107 U. S. 591, 594.
I Tardy's Smith on Receivers (2d Ed.) p. 1143, Secs. 413, *et seq.*
23 Ruling Case Law, p. 110, Sec. 120.
Burnham v. Bowen, 111 U. S. 776, 780.
Kneeland v. American Loan & Trust Co., 136 U. S. 89, 97.
Virginia, etc., Coal Co., v. Central Railroad, etc., Co., 170 U. S. 355, 365.
Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 282.
Gregg v. Metropolitan Trust Co., 197 U. S. 183 (no diversion of income shown).

In Kansas City Terminal Ry. Co. v. Central Union Trust Co., 271 U. S. 445, this Court discussed the power of a Court of equity, in confirming a sale under foreclosure of a mortgage, to require terms and conditions, reasonable in their nature to be inserted in the decree of confirmation.

As to the power of a Court to impose terms as to a plan of reorganization in case of the foreclosure of a mortgage on a railroad:

North American Co. v. St. Louis & S. F. Ry. Co., 28 Fed. (2d) 174.
Central Union Tr. Co. v. Mo. K. & Tex. Ry. Co., 28 Fed. (2d) 176.
Kansas City Ter. Ry. Co. v. Central Union Trust Co., 28 Fed. (2d) 177.

Volume 7, Legal Topics: "Some Legal Phases of Corporate Financing, Reorganization and Regulation."

Under Section 2, clause 5, National Bankruptcy Law, courts of bankruptcy may "authorize the business of bankrupts to be conducted for limited periods by * * * trustees, if necessary, in the best interests of the estate."

1 Remington on Bankruptcy (4th Ed.), p. 554, Sec. 445.

The trustee in bankruptcy therefore should be authorized to conduct the business of Radford, as a farmer, to be conducted by renting the farm in question to Radford "for a limited period" (a relative term).

The extent of the present economic distress prevailing among farmers is disclosed in the original brief filed on the part of the debtor by Mr. Lust and Mr. Krauthoff (large white book).

The fact that 29 States have passed moratoriums (consult appendix, brief for petitioner), is also a striking evidence of the necessity of a reasonable forbearance in the foreclosure of a mortgage on a farm.

The value of farm lands is stabilized by the withholding of excessive foreclosures of farms. The daily press reports substantial improvement in farm values. The Frazier-Lemke Act has played its part in accomplishing this result. A court of equity should be not less diligent in protecting the "vine and fig tree" of an American farmer (Micah 4:4).

As an example of the power of a court of equity in granting relief of an equitable nature in the foreclosure of a mortgage, note.

Equity enforces just rights where the law is inadequate.

21 Corpus Juris, p. 195, Sec. 184, note 52.

In Clark v. Rayburn, 8 Wall. 318, it was held a decree of foreclosure which allowed no time for the payment of the debt could not be sustained:

> "* * * it was always an incident of the remedy that the mortgagor should be allowed a specified time for the payment of the debt. This was fixed by the primary decree, and it might be extended once or oftener at the discretion of the

Chancellor, according to the circumstances of the case."

See, also, Chicago, etc., R. R. Co. v. Fasdick, 106 U. S. 71.
3 Jones on Mortgages (8 Ed.), p. 480, Sec. 2031.

Indeed the glory of the jurisprudence known as equity is its flexibility and adaptability to circumstances as they may present themselves (I Kings 8:59).

Eaton on Equity, p. 11.
21 Corpus Juris, p. 660, Sec. 845.

1 Pom. Eq. Jur. (4 Ed.), p. 122, Sec. 109; pp. 212, 213: Equity "has the power of expansion and of application to an unlimited variety of circumstances, which enables equity to keep abreast with the progress and changing wants of society."

The origin of the doctrine of an equity of redemption as evidenced, as early as the reign of Charles I of England by the entry of a decree to the effect that "the mortgagor had an 'equity to redeem' on payment within a reasonable time of principal, interest and costs, notwithstanding the forfeiture at law."

Eaton on Equity, p. 447, Sec. 215.

As already pointed out, a mortgage was originally self-enforcing. Failure of the mortgagor to pay the debt at the law day of its maturity of itself without more perfected the title of the mortgagee. His remedy thereafter, in the event the mortgagor was in possession of the premises was ejectment of the former owner.

In that state of the law, one braver than his fellows, having failed to pay a mortgage debt on the law day, appealed to the King as the source of all law for relief.

That adviser of the King was an ecclesiastic. Naturally, having studied Isaiah, this ecclesiastic, one of the early chancellors, thought in terms of redemption. Hence as he hoped for redemption of his soul, the chancellor could not do less when it came to redemption from a mortgage.

The spirit which discovered redemption also discovered foreclosure. Inasmuch as the chancellor accorded a debtor redemption, and inasmuch as fundamentally, there could not be one law for the true followers of God and another one for the stranger, the chancellor decreed it to be fair and just that a mortgagor should not be permitted to enjoy twenty years in which to redeem from a mortgage theretofore ripened into a title in fee simple. On the contrary, the chancellor foreclosed or cut off the equity of redemption by fixing a time in which the redemption should take place.

So jealously did courts of equity guard the equity of redemption that to this day an equity of redemption may not be released by a mortgagor by way of inclusion thereof in the mortgage, but only by way of subsequent agreement based upon a new consideration.

Clark v. Rayburn, 8 Wall. 318.
Eaton on Equity, p. 448, Sec. 215; p. 469, Sec. 229.
19 Ruling Case Law, p. 502, Sec. 298.

Reeves Illinois Law of Mortgages, pp. 11, 12, Secs. 7, 8.
41 Corpus Juris, p. 275, Sec. 2.

The doctrine of mortgage foreclosure thus originating in the thought of redemption, then unfolding by a recognition of the justice of foreclosure, progressed by adding the incident of sale of the mortgaged property under a decree of foreclosure.

The time for the entry of this decree rested in the sound discretion of the chancellor.

For example, in Blair v. Chicago, 201 U. S. 400; a Court did not foreclose a mortgage on a street railway without first determining the relations of a mortgagor and a municipality.

In Trustees v. K. C. M. & O. Ry. Co., 26 Fed. (2d) 876, a railway was administered in receivership for fourteen years in order to give the parties in interest an opportunity to reorganize the road.

In the litigation, a phase of which is reported as Gibson v. Continental, etc., Trust & Sav. Bank, 26 Fed. (2d) 872, a street railway was not sold under mortgage until the company had procured a new franchise from the city. The receivership extended from 1920 to 1926.

In Baldwin Locomotive Works v. Missouri, Oklahoma & Gulf Ry. Co., Judge Hook directed a plan of reorganization be prepared before the road be sold under foreclosure. The receivership began in 1913. The decree of foreclosure was entered in 1919.

In the case of The Missouri, Kansas & Texas Ry. Co. (consult Kansas City Terminal Ry. Co. v. Central Union Trust Co., 271 U. S. 445, 28 Fed. (2d) 176, 177), the road was in receivership over seven years.

In the case of Kansas City Joint Stock Land Bank, a receiver was appointed in May 1926. The lien of the bondholders of that company on the assets pledged as security for their bonds was not foreclosed until 1930.

In the Rock Island Cases (April 1, 1935), this Court recognized the propriety of affording a railway system a reasonable opportunity in which to reorganize its financial structure.

In the brief of Reconstruction Finance Corporation filed in that case will be found a collection of instances as to the length of time allowed to railway companies before decrees of foreclosure are entered.

Courts of equity have decided:

(1) An appointment of a receiver in a suit to foreclose a mortgage is an act of grace on the part of the Court and not enforceable as a contract right.

19 Ruling Case Law, p. 562, Sec. 370.
23 Ib., p. 10, Sec. 4.
2 Reeve Illinois Law of Mortgages, p. 610, Sec. 534.

(2) Rents pending expiration of redemption period are not impoundable at the instance of a mortgagee as a matter of right.

2 Reeve Illinois Law of Mortgages, p. 636, Sec. 551.

(3) A decree of foreclosure should allow a reasonable time in which the debtor may pay the amount found due on the lien being enforced.

8 Wall. 318.
2 Reeve Illinois Law of Mortgages, p. 731, Sec. 649; p. 733, Sec. 651; p. 747, Sec. 666.

"Mortgage sales will be controller by the court so that no injustice will be done either party."

19 Ruling Case Law, p. 570, Sec. 381.

(4) The lien of the security being foreclosed may be displaced by allowing preferential claims;

1 Tardy's Smith on Receivers (2 Ed.), p. 1143, Sec. 413;

And by the issuance of receiver's certificates.

2 Tardy's Smith on Receivers (2 Ed.), p. 1575, Sec. 541.

(5) A court of equity may fix an upset price to be bid at the sale it orders made.

(6) On a bill to redeem, time is allowed in which to make the redemption.

2 Jones on Mortgages (8 Ed.), p. 904, Sec. 1413.

(7) A court of equity may refuse to confirm a sale made under its decree.

19 Ruling Case Law, p. 581, Sec. 394.

(8) A court of equity may enforce conditions, such as a fair and reasonable plan of reorganization as the price of the decree of sale and confirmation thereof (28 Fed. (2d) 177).

(9) A court of equity may protect a title acquired by virtue of its decree (221 Fed. 545).

Equity is a progressive science. Twenty-nine states have declared a moratorium (Appendix Petitioner's Brief, 290 U. S. 398). Congress clearly attempted to do so in the Frazier-Lemke Act. Can equity do less?

In this connection, it may be intimated, that refinancing a farm and refinancing a railroad do not present the identical problem and are not governed by the same rule. But the reverse of this statement is true. "A time there was" ere our Nation's financial "griefs began" when we enjoyed an individualistic concept of life and living. The logic of events, which as Mr. Frederic R. Condert has observed, is more powerful than the logic of Aristotle, has replaced neighborly helpfulness, whereby one man loaned to another, and loaning oft did not "lose both loan and friend," by an organized system of loaning money on the security of farm mortgages. Farmers desiring to borrow money in these strenuous times, as a practical proposition, have but one source of supply, Federal Farm Mortgage Corporations. All other sources of farm credit on real estate security for the time being are dried and sterile. The record does not show how much money Radford can borrow from such institutions, nor whether or not the Louisville Joint Stock Land Bank will accept in discharge of the debt due it, the money which Radford may be able to borrow in the manner stated.

Mr. Radford can only refinance his farm indebtedness through a system now in existence or one hereafter organized. The problem of the debtor in this proceeding requires time for its solution. A court of equity which gives time to a railroad in which to reorganize its financial structure cannot do less for the "embattled farmers," fit descendants of those who at Concord, "fired the shot heard round the world" and the ashes of whose kindred mingle with the soil of France.

Cox v. Wood, 247 U. S. 3.
Selective Draft Law Cases, 245 U. S. 366.

Consult brief of John W. Davis, 245 U. S. 368.

Congress is endeavoring to remedy the situation (Senate Bill No. 2416, Rep. No. 498). A like bill is pending in the House of Representatives introduced by Mr. Lemke (H. R. 5452). Pending congressional action, this Court should preserve the *status quo* of farm indebtedness and prevent foreclosures of farm mortgages, under such terms and conditions as may be just and reasonable.

CONCLUSION.

The following recommendations are submitted for the consideration of the Court:

(1) That the Court, at this time, for the information and guidance of all parties in interest reaffirm the doctrine of the Rock Island cases, and hold that the underlying principle and dominant theory of the

Frazier-Lemke Act, relief to the debtor as well as protection to the creditor ("equal and exact justice to all men") be sustained as constitutional.

(2) That the Court restore the case to the docket for reargument on the following propositions:

(a) The effect of the doctrine of the Miner case upon the Frazier-Lemke Act;

(b) The inherent power of a Court of bankruptcy to impose equitable terms in the foreclosure of a mortgage upon property and its jurisdiction of mortgaged property owned by the debtor.

Or in the alternative:

(a) That the Court point out to Congress the effect of its action in making the operative force and effect of paragraph (3) of the Frazier-Lemke Act depend upon the consent of the lienholder.

(3) That the proceeding be remanded to the District Court with authority in that Court, to protect the debtor in the possession of his farm, pending a reorganization of the farm loan system of America and Congressional action, upon such terms and in such manner as to that Court may deem just and reasonable.

(4) That the debtor be accorded such other and further relief as to the Court may seem just and equitable.

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